VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY

Comments to the Proposed Regulations Governing Special Education Programs for Children with Disabilities in Virginia

PART 1.

8 VAC 20-81-10 Definitions

"Child Study Committee" definition was deleted.

Recommendation: The definition of "Child Study Committee" should remain as it appears in the current Virginia regulations. If the definition of Child Study Committee is deleted, it will have a negative impact on students and would not allow parents to participate in the screening process. Moreover, if Child Study provisions are deleted, no consistency among LEAs in Virginia would exist regarding child screenings. Parents should be able to expect consistency with the screening process in the event they move from one school district in Virginia to another in Virginia.

Under the definition of "Child with a disability" the terms "Developmental Delay" and "Severe Disability" were deleted.

Recommendation: The definitions of "Developmental Delay" and "Severe Disability" should remain as they appear in the current Virginia regulations. Developmental delay appears as a separate definition in the proposed regulations but should also be included within this definition to ensure uniformity and consistency. It is important to include Severe Disability because of the nature and severity of this disability and the number of children with it, all of whom could be excluded if the definition is removed.

"Developmental delay"—"means a disability affecting a child ages two by September 30 ~~through five~~ through nine inclusive: …"

Recommendation: Extend the age range to 9, as allowed by federal regulation 34 C.F.R. § 300.8 (b). Some children under the age of 9 have disabilities that cannot be accurately determined because of their young age. Allowing them to be found eligible under the more general category of 'developmental delay' avoids inaccurate labeling and potentially inappropriate or unnecessary services.

"Functional Behavioral Assessment"— Reword to say "Functional Behavioral Assessment means an evaluation to determine the underlying cause or functions of a child's behavior that impede the learning of a child with a disability or the learning of the child's peers."

Recommendation: "Functional Behavioral Assessment" should be defined as an evaluation because it seeks to determine the underlying cause or functions of a child's behavior that impede the learning of the child with a disability or the learning of their

peers. Schools have been claiming that a Functional Behavioral Assessment (FBA) is not an evaluation. However, after IDEA 2004 was passed, the Office of Special Education Programs (OSEP) issued a Letter reiterating its position that a FBA is an evaluation. See Letter to Christiansen, dated February 9, 2007. That letter says, in part, that: "If a FBA is used to evaluate an individual child in accordance with 34 C.F.R. §§ 300.304 through 300.311 to assist in determining whether the child is a child with a disability and the nature and extent of special education and related services that the child needs, it is considered an evaluation under Part B and the regulation at 34 C.F.R. § 300.15…." Additionally, a FBA should not simply be a 'review of existing data' as proposed; rather, it should evaluate the child in all settings throughout the school day.

"Impartial Hearing Officer" definition was deleted.

Recommendation: The definition of "Impartial Hearing Officer" should remain as it appears in the current Virginia regulations. In the proposed Regulations, the Virginia Department of Education (VDOE) wants to shift control of Hearing Officers from the Virginia Supreme Court to VDOE. This is inappropriate because it allows for the possibility of 'tainted' Hearing Officers, rather than truly impartial Hearing Officers under control of the Virginia Supreme Court.

"Implementation Plan" definition was deleted.

Recommendation: The definition of "Implementation Plan" should remain as it appears in the current Virginia regulations. It is important that the definition of Implementation Plans is kept because it places a responsibility on a Local Educational Agency (LEA) to identify how they will address and/or correct a deficiency within their school district.

"Intellectual Disability" should be used in place of "Mental Retardation."

Recommendation: VDOE should proactively change the definition of "Mental Retardation" to adhere to the new "Intellectual Disability" language set forth by the General Assembly in 2008.

"Interpreting Services" ~~as used with respect to children who are deaf or hard of hearing~~, means services provided by personnel who meet the qualifications set forth under 8 VAC 20-81-40 and includes translating from one language to another (e.g., sign language to spoken English), oral interpreting and transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time transcription (CART), C-Print, and TypeWell

Recommendation: The above strike-through phrase should be deleted because there are children who are not deaf or hard of hearing that utilize interpreting services (i.e., Oral Motor Apraxia, Down's Syndrome). Also, the above underlined section appears in the current Virginia regulations and should be maintained. It includes those children who may utilize oral interpreting and who communicate via translating from one language to

another. To leave out this group would unnecessarily narrow what kinds of interpreting services can be provided.

"Level I services" "means the provision of special education and related services to children with disabilities for less than 50% of their instructional school day (excluding intermission for meals). The time that a child receives special education services is calculated on the basis of special education services described in the individualized education program, rather than the location of services."

Recommendation: The above underlined section appears in the current Virginia regulations and should be maintained. This would clarify that children receiving Level I services may also be receiving related services.

"Mental Retardation"

Recommendation: The term "mental retardation" should be stricken in lieu of the new term "Intellectual Disability." VDOE should proactively change the definition of "Mental Retardation" to adhere to the new "Intellectual Disability" language set forth by the General Assembly in 2008.

Under "Other Health Impairment" the terms "tuberculosis" and "arthritis" were deleted.

Recommendation: The definition of "Other Health Impairment" should remain as it appears in the current Virginia regulations, with "tuberculosis" and "arthritis" included. To leave out these two disabilities is unnecessary.

"Parent"— 1 b (i-iii): "~~i. if the biological parent(s)' authority to make educational decisions on the child's behalf ahs been extinguished under §§ 16.1-283, 16.1-277.01 or 16.1-277.02 of the Code of Virginia or a comparable law in another state; ii. the child is in permanent foster care pursuant to § 63.2-900 et seq. of the Code of Virginia or comparable law in another state; and iii. the foster parent has an on-going, long-term parental relationship with the child, is willing to make the educational decisions required of the parent under this chapter, and has no interest that would conflict with the interests of the child."~~

Recommendation: The above strike-through phrase is not included in the federal definition of parent in 34 C.F.R. § 300.30 and should be deleted. If this phrase were to be kept in, it would conflict with the federal regulations because it is too narrow. The federal definition allows foster parents to act as parents when the biological or adoptive parents are not acting as parents. Moreover, the federal definition protects biological and adoptive parents' rights by ensuring that they will be the parent when they act as parents.

Under "Related Services" the terms "Transliterating" and "Psychological Counseling" were deleted.

Recommendation: The definition of "Related Services" should remain as it appears in the current Virginia regulations with the terms "Transliterating" and "Psychological Counseling." To leave these out would unnecessarily limit the types of related services children with disabilities can receive.

"Severe Disability" definition was deleted.

Recommendation: The definition of "Severe Disability" should remain as it appears in the current Virginia regulations. Severe Disability is important because of the nature and severity of children with this disability. This class of children should not be excluded.

"Special Education Hearing Officer" definition was added.

Recommendation: This definition should be deleted because VOPA proposes that the Hearing Officers should be maintained by the Supreme Court, not VDOE. The definition of "Impartial Hearing Officer" should be kept as it appears in the current Virginia regulations.

"Specific Learning Disability"— 1. ~~"Dyslexia is distinguished from other learning disabilities due to its weakness occurring at the phonological level. Dyslexia is a specific learning disability that is neurobiological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge."~~

Recommendation: The above strike-through paragraph was added in the proposed regulations and does not appear in the current Virginia Regulations. This paragraph should be deleted because it is merely a statement and does not define specific learning disability. The emphasis on the phonological and neurobiological components conflicts with, and is in contrast with, the original definition set forth in the preceding sentence, which describes a disorder in one or more of the basic psychological processes.

PART II. Responsibilities of the State Department of Education

8 VAC 20-81-20

1 e. "~~Are in~~ Need special education and related services, even though they have not failed or been retained in a course or grade, and are advancing from grade to grade;"

Recommendation: Deleting the strike-through language and adding the underlined word is consistent with 34 C.F.R. §300.101(c)(1), and specifies that special education is not a placement, but a service to children with disabilities.

4. "Ensure that each local educational agency includes all children with disabilities in all general Virginia Department of Education and division-wide assessment programs, including assessments described in section 1111 of ESEA, with appropriate accommodations, modifications, and alternate assessments where necessary and as indicated in their respective IEPs and in accordance with the provisions of the Act at section 1412."

Recommendation: The underlined word appears in the current Virginia regulations and should be kept. IEP's should include modifications to assessments to assist children who take assessments.

5. "Ensure that each local educational agency takes steps for its children with disabilities ~~to~~ have available to them the variety of educational programs and services available to nondisabled children in the area served by the local educational agency, including art, music, industrial arts, consumer and homemaking education, and career and technical education."

Recommendation: The underlined language is consistent with 34 C.F.R. §300.110 and should be added to ensure consistency with federal regulations.

PART III.

8 VAC 20-81-50 Child Find.

Screening (C)— "Screening.
1. Each local school division shall have procedures that ensure that all children are screened within 60 business days of enrollment, including transfers from out of state as follows:
a. Children shall be screened in the areas of hearing and vision in accordance with the requirements of 8 VAC 20-250-10.
b. Children shall be screened for scoliosis in accordance with the requirements of 8 VAC 20-690-20.
c. Children shall be screened in the areas of speech, voice, language, and fine and gross motor functions to determine if a referral for an evaluation for special education and related services is indicated.
d. Children who fail any of the above screenings may be rescreened after 60 days if the original results are not considered valid.
e. The screening may take place up to 60 business days prior to the start of school. The local educational agency may recognize screenings reported as part of the child's pre-school physical examination required under the Code of Virginia if completed within the above prescribed time line.
f. Children shall be referred to the special education administrator or designee no more than 5 business days after screening or rescreening if results suggest that a referral for evaluation for special education and related services is indicated. The referral shall include the screening results."

Recommendation: The proposed regulations deleted the specific 60 business day timeline that appears in the current Virginia regulations. Without the specific 60 business day timeline, each LEA would be allowed to craft its own timelines. The above underlined phrases, which are consistent with the current regulations, ensure a specific timeline and ensure accountability for schools.

Child Study Committee has been deleted from the proposed regulations. The proposed regulations would allow each LEA to develop its own procedures regarding referrals of children suspected of having a disability, which would not ensure uniformity across school divisions in Virginia.

Recommendation: The current Virginia regulations regarding Child Study Committee should be maintained. The following proposed sections on Screening should be deleted: (C), (D), and (E). If Child Study Committees are deleted, it will have a negative impact on students and would not allow parents to participate in the screening process. Moreover, if Child Study provisions are deleted, no consistency among LEAs in Virginia would exist regarding child screenings. Parents should be able to expect consistency with the screening process in the event they move from one school district in Virginia to another in Virginia.

8 VAC 20-81-60 Referral for Initial Evaluation.

A 1—deleted the regulation regarding referrals from Child Study Committee and timeframes.

Recommendation: The current Virginia Regulations regarding referrals from Child Study Committee and current timeframes should be maintained. If Child Study Committees are deleted, it will have a negative impact on students and would not allow parents to participate in the screening process. Moreover, if Child Study provisions are deleted, no consistency among LEAs in Virginia would exist regarding child screenings. Parents should be able to expect consistency with the screening process in the event they move from one school district in Virginia to another in Virginia.

B 1 d—"Inform the parent(s) of the procedures for the determination of needed evaluation data ~~and request any evaluation information the parent(s) may have on the child~~."

Recommendation: The strike-through phrase does not appear in the current regulations and should be deleted. A parent may have evaluations they do not want to share with the LEA. If a parent obtains private evaluations, then the parent should be under no legal obligation to share those evaluations with the LEA.

B 1—deleted Child Study Committee information.

Recommendation: The current Virginia Regulations regarding referrals from Child Study Committee and current timeframes should be maintained. If Child Study Committees are deleted, it will have a negative impact on students and would not allow parents to participate in the screening process. Moreover, if Child Study provisions are deleted, no consistency among LEAs in Virginia would exist regarding child screenings. Parents should be able to expect consistency with the screening process in the event they move from one school district in Virginia to another in Virginia.

B 1 g—"Ensure that all evaluations are completed and that decisions about eligibility are made within ~~65 business days~~ 60 calendar days ~~after the parent has provided written consent to the evaluation process~~ after the referral for evaluation is received by the special education administrator or designee…."

Recommendation: The federal requirement of 60 calendar days to complete evaluations and make determinations regarding eligibility should be adopted. If it is allowed to remain, children will have to wait longer for evaluations and eligibility determinations than required by federal law. The proposed regulation allows LEAs to violate federal law in the way they conduct evaluations and make decisions. The federal 60 day limit provides ample time for an evaluation.

Additionally, the strike-through language regarding the parents providing written consent should be deleted. The underlined phrase, which appears in the current regulations, should be maintained. A parent could make a referral and spend days or weeks waiting for the LEA to provide the documentation for consent or explain to the parent that consent is needed. Parents who are new to the process may not understand that no action will take place until parental consent is obtained.

B 1 h—"~~The parent and eligibility group may agree in writing to extend the 65 day timeline to obtain additional data that cannot be obtained within the 65 business days~~."

Recommendation: The strike-through phrase is new and should be deleted because it unnecessarily drags out the evaluation process. The federal requirement of 60 calendar days provides more than adequate time for an evaluation.

8 VAC 20-81-70 Evaluation and Reevaluation.

B 1 b 2: "The present levels of performance and educational needs of the child."

Recommendation: The regulations should specify that "present levels of performance" should be determined by the evaluation process, as is stated in the current Virginia regulations. The present levels of performance are important because they allow parents and professionals working with the child to ascertain where the child is educationally functioning.

B 1 b: "…whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum…"

Recommendation: The above underlined section was deleted in the proposed regulations and should be maintained as it appears in current Virginia regulations. Additions and modifications to special education and related services are things that should be considered when completing evaluations.

F 1 c: Reevaluation shall be conducted "at least once every three years ~~unless the parent and local educational agency agree that a reevaluation is unnecessary.~~"

Recommendation: The above strike-through phrase should be deleted. The regulation states that a reevaluation will take place at least once every 3 years. To add a provision that the reevaluation does not have to be done at 3 year intervals if the parents and LEA agree is inappropriate because triennial evaluations inform the parents and the LEA about the functioning levels of the child.

H 2: Timelines for Reevaluations: "If a reevaluation is conducted for purposes other than the child's triennial, the reevaluation process, including eligibility determination, shall be completed within 60 days of receiving parental consent for the evaluation."
~~in 65 business days from the date of parent's consent to evaluation~~."

Recommendation: Delete the strike-through language and add the underlined language, in keeping with the federal requirement of 60 calendar days to complete evaluations. The proposed regulation is inconsistent with federal regulations. If it is allowed to remain, children will have to wait longer for evaluations and eligibility determinations than required by federal law. The proposed regulation allows schools to violate federal law in the way they conduct evaluations and make decisions. The federal 60 day limit provides more than adequate time for an evaluation.

H 3: "~~The parent and eligibility group may agree in writing to extend the 65 day timeline to obtain additional data that cannot be obtained within the 65 business days~~."

Recommendation: This is a new provision and should be stricken in its entirety. First, as stated above, the deadline for completing evaluations should be 60 calendar days, as set forth in federal law. Secondly, there is no reason for the process to be delayed even if both parties agree because 60 calendar days is ample time for evaluations to be completed.

8 VAC 20-81-80 Eligibility.

D 8 "The local educational agency shall obtain written parental consent for the initial eligibility determination. Thereafter, written parental consent shall be secured for any change in categorical identification in the child's disability and for any determination that a child is no longer eligible for special education services."

Recommendation: The above underlined phrase should be added to the proposed regulations. VOPA recommends that written parental consent be required for partial or full termination of services. A determination of ineligibility is the first step in termination of services and consent should be required to make this change.

H. "~~The characteristics of each of the disabilities listed in this section shall have an adverse effect on educational performance and make it necessary for the child to have special education to address the needs of the child that result from the child's disability and to ensure access to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. For children with developmental delay, ensuring access to the general curriculum means ensuring the child's access to the general educational activities for this age group.~~"

Recommendation: Delete the strike-through section in its entirety. This is a new section in the proposed regulations. The proposed regulation adds criteria for eligibility beyond that required by federal law, thereby making it more difficult for children to be found eligible for special education. Federal law requires that LEAs go through each disability category and determine whether the child has that disability and, if so, whether the disability adversely affects his or her educational performance. The proposed regulation places additional requirements for eligibility beyond those in federal law and is, therefore, unconstitutional. We oppose the addition of this other criteria listed in the proposed section.

I. "The Virginia Department of Education adopts criteria for determining whether a child has a disability by using the applicable federal definitions of disability category in conjunction with appropriate evaluations and assessments as required under 8 VAC 20-80-70 ~~determination of eligibility criteria~~ for all children suspected of having a disability and does not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a disability."

Recommendation: Insert the above underlined language and delete the strike-through language. The proposed regulations have new criteria that are not required under federal regulations (other than in the Specific Learning Disability category) and set forth additional unnecessary barriers for parents and children with disabilities. The new provisions would have eligibility teams in the position of being medical professionals—diagnosticians—a role for which they are not qualified. The proposed eligibility criteria appear to be arbitrary (such as meeting 6 characteristics in the list required for autism). If these new provisions were to be adopted, they will lead to increased litigation, delays in eligibility determinations, and battles between the schools and the parent's experts.

Recommendation: The same is true for Sections L-S, below. These sections all establish new criteria for eligibility that make it more difficult for children to be found eligible for special education. We strongly oppose the additions proposed in L-S below because the only disabilities that have eligibility criteria mentioned in the current Virginia regulations are the SLD and DD disabilities. We agree that there should be criteria for

the SLD disability, as this is required by the federal regulations, but oppose adding new criteria for other disabilities as they are not included in or required by federal regulations.

L. Eligibility as a child with autism.

Recommendation: This section should be removed in its entirety. It is new and places eligibility criteria beyond that required by the federal regulations. Thus, it makes it more difficult for children to be found eligible for special education and is, therefore, in conflict with the federal regulations. Moreover, LEAs are not medical professionals and should not attempt to diagnose autism.

M. Eligibility as a child with deafness.

Recommendation: This section should be removed in its entirety. It is new and places eligibility criteria beyond that required by the federal regulations. Thus, it makes it more difficult for children to be found eligible for special education and is, therefore, in conflict with the federal regulations. Again, it gives LEAs the authority to medically diagnose children. We oppose this new power. We also oppose the fact that the regulation only addresses bilateral hearing loss without addressing unilateral hearing loss.

N. 1-2. Eligibility as a child with developmental delay. "1. The local educational agency may include developmental delay as one of the disability categories when determining whether a preschool child, aged two by September 30 to ~~five~~ nine, inclusive, is eligible under this chapter. 2. Other disability categories may be used for any child with a disability aged two to ~~five~~ nine inclusive."

Recommendation: Extend the age range to 9, as allowed by federal regulation 34 C.F.R. § 300.8 (b). Some children under the age of 9 have disabilities that cannot be accurately determined because of their young age. Allowing them to be found eligible under the more general category of 'developmental delay' avoids inaccurate labeling and inappropriate or unnecessary services.

O. Eligibility as a child with hearing impairment.

Recommendation: This section should be removed in its entirety. It is new and places eligibility criteria beyond that required by the federal regulations. Thus, it makes it more difficult for children to be found eligible for special education and is, therefore, in conflict with the federal regulations. We also oppose the regulation because it does not allow for or require an evaluation of the child's hearing.

P. Eligibility as a child with mental retardation.

Recommendation: This section should be removed in its entirety. It is new and places eligibility criteria beyond that required by the federal regulations. Thus, it makes it more difficult for children to be found eligible for special education and is, therefore, in

conflict with the federal regulations. As with several other regulations, it improperly gives LEAs the power to medically diagnose a child.

Q. Eligibility as a child with other health impairment.

Recommendation: This section should be removed in its entirety. It is new and places eligibility criteria beyond that required by the federal regulations. Thus, it makes it more difficult for children to be found eligible for special education and is, therefore, in conflict with the federal regulations. As with several other regulations, it improperly gives LEAs the power to medically diagnose a child. Also, we oppose the addition of this section because it does not include "Attention Deficit Disorder" as included in current Virginia regulations.

R. Eligibility as a child with speech or language impairment.

Recommendation: This section should be removed in its entirety. It is new and places eligibility criteria beyond that required by the federal regulations. Thus, it makes it more difficult for children to be found eligible for special education and is, therefore, in conflict with the federal regulations. As with several other regulations, it improperly gives LEAs the power to medically diagnose a child.

S. Eligibility as child with visual impairment.

Recommendation: This section should be removed in its entirety. It is new and places eligibility criteria beyond that required by the federal regulations. Thus, it makes it more difficult for children to be found eligible for special education and is, therefore, in conflict with the federal regulations. As with several other regulations, it improperly gives LEAs the power to medically diagnose a child.

8 VAC 20-81-90 Termination of special education and related services.

B 1. "Termination of special education services occurs if the team determines that the child is no longer a child with a disability who needs special education and related services and only if written parental consent is secured."

Recommendation: The above underlined phrase should be added in keeping with current Virginia regulations. The proposed regulation as written allows for special education and related services to be terminated without parental consent and VOPA strongly opposes this elimination of parental consent.

B 2. "A related service may be terminated during an IEP meeting without determining that the child is no longer a child with a disability who is eligible for special education and related services. The IEP team making the determination shall include local educational agency personnel representing the specific related services discipline being terminated. Parental consent must be required before terminating any related services."

Recommendation: The above underlined phrase should be added in keeping with current Virginia regulations. The proposed regulation as written allows for related services to be terminated without parental consent and we strongly oppose the erosion of parental rights.

B 3. "Prior to any partial or complete termination of special education and related services, the local educational agency shall comply with the prior written notice requirements of 8 VAC 20-80-170 C, ~~but parental consent is not required."~~

Recommendation: The above strike-through phrase should be removed in keeping with the current Virginia regulations. The proposed regulation as written says that prior written notice must be given, but that parental consent is not required, before the termination of special education and related services. We oppose any partial or complete termination of special education and related services without parental consent.

8 VAC 20-81-100 Free appropriate public education.

A 1. "A free appropriate public education shall be available to all children with disabilities who need special education and related services, aged two to 21, inclusive, ~~who meet the age of eligibility requirements in 8 VAC 20-81-10~~ and who reside within the jurisdiction of each local educational agency. This includes children with disabilities who are in need of special education and related services even though they have not failed or been retained in a course or grade and are advancing from grade to grade, and students who have been suspended or expelled from school in accordance with the provisions of 8 VAC 20-81-160. The Virginia Department of Education has a goal of providing full educational opportunity to all children with disabilities aged birth through 21, inclusive, by 2015. Each LEA shall establish a goal of providing a full educational opportunity for all children with disabilities from 2 to 21, inclusive, residing in its jurisdiction."

Recommendation: The above strike-through phrase should be removed in keeping with the current Virginia regulations. This regulation as written refers to the proposed DD age of 2-5 in the proposed 8 VAC 20-81-10. Since we oppose the proposed restrictive age of DD, we oppose the addition of this phrase.

The above underlined phrase should remain as it appears in the current Virginia regulations. We believe it is important for each LEA to continue to have this goal in order to be held to a measure of accountability.

8 VAC 20-81-110 Individualized Education program.

B 2 b. "Is developed within 30 calendar days of the date of the initial determination that the child needs special education and related services and is implemented as soon as possible following the IEP meeting."

Recommendation: The above underlined phrase should remain as it appears in the current Virginia regulations. Without this phrase, LEAs could develop IEP's but not be under any mandate to actually implement them within any time-frame. Keeping the underlined phrase in holds LEAs accountable for implementing IEPs as soon as possible following the IEP meeting. Additionally, IEPs are already formatted to prescribe specific dates when services begin and end. This existing format provides parental awareness and consent for when services begin and end.

B 2 d. IEP ~~"is implemented as soon as possible following parental consent to the IEP, not to exceed 30 calendar days, unless the LEA documents the reasons for the delay~~."

Recommendation: This section should be deleted in its entirety. The LEA already has 30 days to implement the IEP and to allow this timeframe to be extended an additional month as long as the LEA documents the reason for the delay is unacceptable. Allowing an additional month to begin services is inconsistent with the requirements that enable children with disabilities to be educated with children without disabilities to the maximum extent possible.

B. "Each local educational agency must make a good faith effort to assist the child to achieve the goals, including benchmarks or objectives listed in the IEP"

Recommendation: The above underlined section was deleted from the proposed regulations but should remain as it appears in the current Virginia regulations. This section is important because it requires each LEA to make a good faith effort to assist the child in achieving the goals, benchmarks and objectives in his/her IEP. Parents want this assurance from LEAs. Benchmarks and short-term objectives are very important because they break down the child's goals into steps that teachers can measure the child's progress against. Benchmarks and short-term objectives inform the parents and the LEA as to whether the child is meeting his/her goals in a timely manner and ensure that any lack of progress can be addressed by the IEP Team during the school year.

B 10. "In making changes to a child's IEP after the annual IEP team meeting for the school year, the parent(s) and the local educational agency may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.
a. If changes are made to the child's IEP, the local educational agency shall ensure that the child's IEP team is informed of those changes;
b. ~~Upon request, a~~ The parent(s) shall be provided with a revised copy of the IEP with the amendments incorporated. Implementation requirements of subdivision B.2 and timeline requirements subdivision E.8 also apply;"

Recommendation: Parents need to be made aware that their child's IEP has been revised what the revisions are, and when the revisions will be implemented. Without the recommended changes above, parents may have a different understanding of what services are being provided to their child. Parents should have an accurate updated IEP

because it sets forth their child's educational program. Moreover, parents may not know of the right to request a copy of the revised IEP.

E 8. "The local educational agency shall give the parent(s) a copy of the child's IEP at no cost to the parent(s) at the IEP meeting~~, but no later than 10 calendar days from the date of the IEP meeting.~~"

Recommendation: The above strike-through section does not appear in the current Virginia regulations and should be deleted. The proposed 10 days for a LEA to transmit an IEP to a parent is too long and will result in unlawful delays of service. In Virginia, many LEAs craft IEPs in electronic format during the IEP meeting, thereby facilitating speedy updates to the IEP and allowing for the LEA to give the parent a copy of the IEP during the meeting.

F 5 b. "~~Nothing in this section shall be construed to require that additional information be included in the child's IEP beyond what is explicitly required in this chapter.~~"

Recommendation: The above strike-through phrase should be removed in keeping with the current Virginia regulations. VOPA opposes this proposed section because IEPs are individualized to the child and, in certain circumstances for certain children, additional information will assist the child's IEP Team in ensuring that the child receives a free appropriate public education. If such information is necessary, it should be included. Moreover, the discussion section of the Federal regulations for Section 300.320(d) states: "Section 300.320(d), consistent with section 614(d)(1)(A)(ii)(I) of the Act, does not prohibit States or LEAs from requiring IEPs to include information beyond that which is explicitly required in section 614 of the Act."

G 2. "A statement of measurable annual goals, <u>including benchmarks or short-term objectives</u>, and including academic and functional goals designed to: …"

Recommendation: The above underlined phrase should remain as in it appears in the current Virginia regulations. Benchmarks and short-term objectives are very important because they break down the child's goals into steps that teachers can measure the child's progress against. Benchmarks and short-term objectives inform the parents and the LEA as to whether the child is meeting his/her goals in a timely manner and ensure that any lack of progress can be addressed by the IEP Team during the school year.

G 3 a. "~~The IEP Team may determine that benchmarks or short-term objectives are required for other children with disabilities in order for the children to benefit educationally.~~"

Recommendation: This section is new and should be removed in its entirety. This does not need to be added because we believe that benchmarks or short-term objectives should be required for all children. Benchmarks and short-term objectives are very important because they break down the child's goals into steps that teachers can measure the child's progress against. Benchmarks and short-term objectives inform the parent and the LEA

as to whether the child is meeting his/her goals in a timely manner and ensure that any lack of progress can be addressed by the IEP Team during the school year.

G 8. "A statement of: (a) How the child's progress towards the annual goals will be measured; (b)when periodic reports on the progress the child is making toward meeting the goals will be provided; for example, through the use of quarterly or other periodic reports, concurrent with the issuance of report cards, but "at least as often as parents are informed of the progress of their children without disabilities and the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year."

Recommendation: Insert the above underlined phrase as it appears in the current Virginia regulations. It is important for parents of children with disabilities to receive information on their child's progress; especially that they receive it as often as the parents of children without disabilities receive information on their child without a disability's progress.

G 10 c. "Transition services shall be based on the individual child's needs, taking into account the child's strengths, preferences, and interests and shall include related services, community experiences, the development of employment and other post-school adult living objectives; and if appropriate, the acquisition of daily living skills and functional vocational evaluation."

Recommendation: The above underlined section should remain as it appears in the current Virginia regulations. These are extremely important services for the IEP Team to consider when determining how to appropriately prepare the child for life after high school.

8 VAC 20-81-120. Children who transfer.

A 2. "The new local educational agency shall provide a free appropriate public education to the child, in consultation with the parent(s), and implement the IEP from the previous LEA ~~including services comparable to those described in the child's IEP from the previous local educational agency,~~ until the new local educational agency either: (a) adopts the child's IEP from the previous local educational agency; or (b) conducts an evaluation, if determined necessary by the local educational agency, and (c) develops and implements a new IEP that meets the requirements in this chapter."

Recommendation: This is a new section that does not appear in the current Virginia regulations. VOPA believes that a child's IEP should be transferred with the child. Therefore, we propose removing the above language that has been struck through and inserting the underlined language. It is our position that an IEP remains in effect until a new IEP is signed; thus, this should also apply to children who transfer so they do not experience a stop or a delay in their IEP services.

A 4. "If the parent does not provide written consent to a new IEP or an interim IEP, the local educational agency shall provide FAPE, in consultation with the parent(s), and

implement the IEP from the previous LEA. ~~including services comparable to those described in the child's IEP from the previous local educational agency~~."

Recommendation: As stated above, we believe that a child's IEP should be transferred with the child, so we propose removing the above language that has been struck through and inserting the underlined language. It is our position that an IEP remains in effect until a new IEP is signed; thus, this should also apply to children who transfer so they do not experience a stop or a delay in their IEP services.

8 VAC 20-81-130 Least Restrictive environment and placements.

B 2. "The continuum shall: … Make provision for supplementary services (e.g., resource room or services or itinerant instruction) to be provided in conjunction with regular education class placement. The continuum includes integrated service delivery, which occurs when some or all goals, including benchmarks and objectives ~~if required~~, of the student's IEP are met in the general education setting with age-appropriate peers."

Recommendation: The strike-through language should be removed. We propose keeping the requirements for benchmarks and short-term objectives as they appear in the current Virginia regulations. We believe that benchmarks or short-term objectives should be required for all children. Benchmarks and short-term objectives are very important because they break down the child's goals into steps that teachers can measure the child's progress against. Benchmarks and short-term objectives inform the parents and the LEA as to whether the child is meeting his/her goals in a timely manner and ensure that any lack of progress can be addressed by the IEP Team during the school year.

8 VAC 20-81-160 Discipline procedures.

A General "A child with a disability shall be entitled to the same due process rights that all children are entitled to under the Code of Virginia and the local educational agency's disciplinary policies and procedures. ~~School personnel may consider any unique circumstances on a case-by-case basis when deciding whether or not to order a change in placement for a child with a disability that violates a code of student conduct.~~

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be deleted. LEA personnel may abuse their discretion in disciplinary matters if this section is added.

B 1 b . ~~"(1) The local educational agency determines when isolated, short-term removals for unrelated instances of misconduct are considered a pattern. (2) These removals only constitute a change in placement if the local educational agency determines there is a pattern."~~

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be deleted. If this language is allowed, it gives the LEA

unchecked power to determine when isolated unrelated instances of misconduct are a pattern.

C 2 b. "The child has received a series of short-term removals that constitutes a pattern: …~~because the child's behavior is substantially similar to the child's behavior in previous incidents that results in a series of removals~~…"

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be deleted. The child should receive the MDR protections if he/she has been suspended for 10 days or more in a school year, without having to factor in whether the child's behavior is substantially similar to behavior in previous incidents.

C 3. "~~The local educational agency determines on a case-by-case basis whether a pattern of removals constitutes a change in placement. This determination is subject to review through due process and judicial proceedings."~~

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be deleted. If the proposed language is accepted, the LEA could abuse its power in determining whether a pattern of removals is a change in placement.

C 5 a. Special circumstances "School personnel may remove a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 school days ~~without regard to whether the behavior is determined to be a manifestation of the child's disability~~…"

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be deleted. The child should be afforded the right to a MDR to determine whether the behavior was a manifestation of his/her disability. If it is found to be a manifestation, the child should have the opportunity to return to current placement, if team agrees, rather than the possibility of being removed from current placement for 45 school days.

D 1. "Manifestation Determination is required if the local educational agency is contemplating a removal that constitutes a change in placement for a child with a disability who has violated a code of student conduct of the local educational agency that applies to all students. <u>The local educational agency shall notify the parent(s) with the procedural safeguards notice not later than the date on which the decision to take the action is made."</u>

Recommendation: The underlined section is in the current Virginia regulations, but has been deleted from the proposed regulations. We propose keeping the underlined section to ensure that parents will receive the procedural safeguards.

D 6 c. "Return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change in placement as part of the

modification of the behavioral intervention plan. ~~The exception to this provision is when the child has been removed for not more than 45 school days to an interim alternative educational setting for matters described in subdivision C.5.a. of this section. In that case, school personnel may keep the student in the interim alternative educational setting until the expiration of the 45 day period."~~

Recommendation: The strike-through section is not in the current Virginia regulations should be deleted because we recommend that C.5.a be deleted.

NOTE: The proposed regulations refer to a new term: "Special Education Hearing Officer." This new term would replace the term "Hearing Officer," which appears in the current regulations. VOPA opposes the term "Special Education Hearing Officer" and supports keeping the term "Hearing Officer" as in current Virginia regulations. We oppose the shifting of control of Hearing Officers from the Virginia Supreme Court to VDOE. It is inappropriate for VDOE to assume control over hearing officers, because it allows for the possibility of 'tainted' hearing officers, rather than truly impartial hearing officers.

F 1. Authority of the ~~Special Education~~ Hearing Officer. "A local educational agency may request an expedited due process hearing under the Virginia Department of Education's due process hearing procedures to effect a change in placement of a child with a disability for not more than 45 school days ~~without regard to whether the behavior is determined to be a manifestation of the child's disability~~, if the local educational agency believes that the child's behavior is substantially likely to result in injury or self to others."

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be deleted. We oppose Hearing Officers being under the control of the VDOE instead of being under the control of the Virginia Supreme Court, as they are under the current Virginia regulations.

We also oppose the second strike-through phrase as it is new and not in the current Virginia regulations. We believe children should be afforded the right to a MDR.

We propose keeping the underlined word 'substantially.' It appears in the current Virginia regulations and is consistent with current federal regulations. Replacing 'substantially likely' with 'likely' is a violation of federal regulations and unlawfully lowers the standard.

F 2 b "order a change in the placement to an appropriate interim alternative educational setting for not more than 45 school days if the local educational agency has demonstrated by substantial evidence (beyond a preponderance of the evidence)~~Special Education Hearing Officer determines~~ that maintaining the current placement of the child is substantially likely to result in injury to the student or others."

Recommendation: The underlined phrase is in the current Virginia regulations and should be maintained. The strike-through phrase does not appear in the current Virginia regulations should be deleted. We also oppose the language allowing LEAs to prove by "substantial evidence" that a current placement is likely to result in injury. A LEA should be required to meet a higher burden before a Hearing Officer allows it to change placement. This language is not required by federal law and should be deleted in its entirety.

H 2. "A local educational agency shall be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred: (a) the parent(s) of the child expressed concern in writing (or orally if the parent(s) does not know how to write or has a disability that prevents a written statement) to school personnel that the child is in need of special education and related services; the behavior or performance of the student demonstrates the need for these services.; (b) the parent(s) of the child requested an evaluation of the child to be determined eligible for special education and related services; or (c) a teacher of the child or school personnel expressed concern about a pattern of behavior demonstrated by the child directly to the director of special education of the local educational agency or to other supervisory personnel of the local educational agency."

Recommendation: The underlined language appears in the current Virginia regulations, but was deleted from the proposed regulations. We believe these factors are important for schools to consider.

8 VAC 20-81-170 Procedural safeguards.

A 1 c 6 "~~The exception to the IEP team determination regarding placement is with disciplinary actions involving interim alternative education settings for 45 day removals under 8 VAC 20-81-160 D.6.c.~~"

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be deleted.

C. If the notice relates to an action proposed by the local educational agency that also requires parental consent, the local educational agency may give notice at the time it requests parental consent.

Recommendation: The underlined language appears is in the current Virginia regulations, but was deleted from the proposed regulations. This language is important because we believe that parental consent should be retained; therefore, LEAs should give prior written notice at the time it requests parental consent.

C 2 d. "A description of each evaluation procedure, test, assessment, record, or report the local educational agency used as a basis for the proposed or refused action."

Recommendation: The underlined word appears in the current Virginia regulations, but has been deleted from the proposed regulations; however, it should be kept in. The LEA should be able to use all types of evaluation procedures, including tests taken by the child.

D 1. Procedural Safeguards notice. "A copy of the procedural safeguards available to the parent(s) of a child with a disability shall be given to the parent(s) by the local educational agency only one time a school year, except that a copy shall be given to the parent(s) upon: a. initial referral for or parent request for evaluation; each notification of an IEP meeting; reevaluation of the child; b. if the parent requests an additional copy; receipt of the first state complaint during a school year; d. receipt of the first request for a due process hearing during a school year; and e. on the date on which the decision is made to make a disciplinary removal that constitutes a change in placement."

Recommendation: The underlined language appears in the current Virginia regulations and should be maintained. Parents should receive the procedural safeguards when each notification of an IEP meeting is given and when reevaluations of the child occur. It is important that parents are fully aware of all of their rights. Additionally, the process of reevaluation is a significant event which could result in termination of or substantial change in services.

E. Informed parental consent shall be obtained before:"…any partial or complete termination of special education and related services, except for graduation with a standard or advanced studies diploma…"

Recommendation: The underlined language appears in the current Virginia regulations and should be maintained. Parental consent absolutely should be obtained before terminating any partial or complete special education or related services. Requiring parental consent before terminating any services guarantees that parents are treated as full members of the IEP Team and prevents LEAs from making unilateral eligibility and service termination decisions.

E 2 d Parental consent is not required before "administration of a test or other evaluation that is used to measure progress on the child's goals and benchmarks or objectives and is included in the IEP."

Recommendation: The underlined language appears in the current Virginia regulations and should be maintained because VOPA proposes keeping in benchmarks and short-term objectives as a requirement on all IEPs.

E 2 f "~~Any partial or complete termination of special education and related services.~~

Recommendation: The above strike-through language does not appear in the current Virginia regulations and should be deleted because parental consent should absolutely be required before any partial or complete termination of special education and related services. Requiring parental consent before terminating any services guarantees that

parents are treated as full members of the IEP Team and prevents LEAs from making unilateral eligibility and service termination decisions.

8 VAC 20-81-200 Complaint Resolution procedures.

D 4 f "Notify the parties in writing of any needed corrective actions and the specific steps that shall be taken by the local educational agency to bring it into compliance with applicable timelines. The local educational agency will be given 15 business days from the date of notice of noncompliance to respond and initiate corrective action."

Recommendation: The underlined language appears in the current Virginia regulations, but was deleted from the proposed regulations. This language should be maintained because it places a time-frame on LEAs to respond with the steps they will take in corrective action. Without a timeframe, the LEAs could improperly delay taking corrective action.

8 VAC 20-81-210 Due Process

NOTE: In the proposed Regulations, VDOE wants to shift control of Hearing Officers from the Virginia Supreme Court to VDOE. This is inappropriate because it allows for the possibility of 'tainted' Hearing Officers, rather than truly impartial Hearing Officers under control of the Virginia Supreme Court. If VDOE does end up taking control over Hearing Officers, then VOPA proposes that language be added to ensure that VDOE does not enter into 'ex parte' communications with Hearing Officers and reiterate that Hearing Officers must follow the Code of Ethics that all attorneys are required to follow.

B 1-7—**Recommend** deleting this entire section and maintaining the current Virginia regulations.

B 3 a-e—**Recommend** deleting this entire section and maintaining the current Virginia regulations.

B 4 —**Recommend** deleting this entire section and maintaining the current Virginia regulations.

Recommendation: Delete this entire section (B 4) and maintain the current Virginia regulations on this section. VOPA supports the Virginia Coalition for Students with Disabilities' comments to this section, which are as follows: This proposed section oversteps VDOE's authority in regulating hearing officers. It would allow VDOE to request that decisions be reissued to improve readability. To allow VDOE staff to review decisions for "readability" is too vague and arbitrary. Suggesting edits to a Hearing Officer decision may change the facts or result in other substantive changes to the decision, which inappropriately invades judicial decision-making authority. IDEA 2004 mandates that the decision of the Hearing Officer is final and this means that VDOE staff do not have the authority to change a Hearing Officer's decision. The proposed regulations further imply that VDOE has authority to change decisions when VDOE staff

believes there are errors or conflicts in "data." Virginia's regulations must make clear that review of both errors in fact and errors in law are reserved for the courts. IDEA reserves such review for either impartial appellate hearing officers (which Virginia has rejected), 20 U.S.C.1415(g), or a court of law, 20 U.S.C.1415(I). Hence, a court–not VDOE staff–should decide whether a hearing officer has committed factual error and if so, how to resolve it. In many situations, whether there is a factual error will depend on the evidence presented and the hearing officer's decisions about witness credibility. Moreover, IDEA provides that "A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final," 20 U.S.C. §1415(I), meaning that VDOE Staff do not have the authority to review it.

C.2. "…However, a local educational agency may not initiate a due process hearing to resolve parental withholding or refusing consent for the ~~initial~~ provision of special education to the child."

Recommendation: Delete the strike-through word. This sentence is not in the current Virginia regulations and should only remain in if the word 'initial' is struck. VOPA supports the Virginia Coalition for Students with Disabilities' comments to this section, which are as follows: 20 U.S.C. §1414(a)(1)(D)(i)(II) states that "an agency that is responsible for making a free appropriate public education available to a child with a disability under this part shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child." This language is not limited to initial provision of services. 20 U.S.C. §1414(a)(1)(D)(ii)(II) provides that LEAs may not seek hearings to provide such services when consent is declined. Accordingly, the proposed C.2. is out of compliance with the federal law. Moreover, the U.S. Department of Education announced in issuing the final August 2006 IDEA regulations that it would be proposing regulations regarding parental rights to decline consent and withdraw a child from special education services, 71 Fed. Reg. 46551 (Aug. 14 2006). Because these proposed regulations have not been issued, it is premature for Virginia to give LEAs the right to pursue a hearing for refusals to consent to services after the initial provision of services.

D 1 a "If the local educational agency initiates the due process hearing, the local educational agency shall advise the parent(s) and the Virginia Department of Education in writing of this action <u>by sending each a copy of the request for due process hearing initiated by the local educational agency</u>."

Recommendation: The above section is new and was not in the current Virginia regulations. 34 C.F.R. § 300.508 (a) requires that the party filing a due process complaint must provide to the other party a copy of that complaint. As proposed, this section only says that the LEA has to advise parents of the pending due process action against them and does not mandate that parents receive an actual copy of the request for due process hearing initiated by the LEA, as required by the federal regulations. By inserting the underlined language, it ensures parents will receive a copy of the request for due process hearing filed by the LEA.

D 6 a Procedure for requesting a due process hearing. "~~If the local educational agency is not the initiating party to the due process hearing proceeding, the Special Education Hearing Officer has the discretionary authority to permit the local educational agency to raise issues at the hearing that were not raised in the parent's(s') request for due process in light of particular facts and circumstances of the case.~~"

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be deleted. If the proposed language is allowed, LEAs would have the right to raise issues at the hearing that were not raised in the parent's initial request for due process. This same right is not afforded to parents if the LEA is the initiating the due process claim—meaning that the parent would not be given the right to raise additional issues at the hearing that the LEA did not raise in its due process request. In addition, this authority does not appear in and is not required by the federal regulations.

E 2

Recommendation: VOPA supports the Virginia Coalition for Students with Disabilities comments on section E2, which are as follows: Amend proposed E.2. to provide that a new resolution session need not be held if a motion for insufficiency is granted and parents amend their complaint. The U.S. Department of Education, in the federal regulation commentary, states that in such situations, "There is no need to hold more than one resolution meeting, impose additional procedural rules, or otherwise adjust the resolution timeline." 71 Fed. Reg. 46699. It is contrary to IDEA's purposes to put children in a holding pattern where complaints are dismissed for insufficiency and their parents must go through the entire process, including another 30 day resolution period, before they can finally have a hearing to adjudicate their claim. In the meantime, the child falls farther and farther behind.

Amend proposed E.2. to state that parties need to go through the amendment procedure only when seeking to significantly change the subject matter of the complaint, but they may correct minor insufficiencies--such as leaving out the child's address or name of his/her school–without going through the amendment process, particularly if the LEA already has this information in its files. Most parents are not knowledgeable about the IDEA's procedural details and will have difficulty effectively using the hearing process. When a complaint is amended, the entire hearing process starts over. The parent must go through a 30-day resolution period, and then wait 45 days after that for a hearing decision. § 615 (c)(2)(E)(ii). It makes no sense to require parents to do this for very minor errors, such as leaving out the child's full name, address or school name that the LEA has readily available in its records. If every minor error results in parents being required to amend the complaint or start the hearing process from the beginning, the child's ability to obtain a hearing and relief will be inordinately delayed by adding another 75 days to the process.

Amend proposed E.2. to require hearing officers to allow due process complaint notices to be amended unless doing so would prejudice the other party. IDEA 2004 permits

hearing officers to grant leave to amend complaints, but the regulations do not provide guidance to hearing officers about when it is appropriate to do so. Parents will not know and understand the hearing procedural rules in detail. They should be able to amend complaints when necessary, rather than having to start the entire process from the beginning with a new complaint. The prejudice standard is clear and appropriate. In the alternative, the standard applied to complaints in federal court should be used. Since 1937, Federal Rule of Civil Procedure 15(a) has required that leave to amend be "freely given when justice so requires."

F. Assignment of the Special Education Hearing Officer.

Recommendation: Maintain current Virginia regulations requiring that hearing officers be appointed by the Supreme Court of Virginia. Supreme Court appointment of hearing officers is important to ensure impartiality. Because the actions of the SEA may at times be an issue in a due process proceeding, it is important the hearing officers be completely independent and appointed by the Supreme Court. The danger for conflicts of interest is too great. There should not even be the appearance of impropriety in selecting a hearing officer. Retaining the authority in the Supreme Court is also consistent with its role in administering the judiciary; hearing officers are the first level of the judicial process for IDEA cases.

F 3 a-b "Either party has five business days after notice of the appointment is received or the basis for the objection becomes known to the party to object to the appointment by presenting a request for consideration of the objection to the Special Education Hearing Officer.

~~a. If the Special Education Hearing Officer's ruling on the objection does not resolve the objection, then within five business days of receipt of the ruling the party may proceed to file an objection with the Virginia Department of Education. The failure to file a timely objection serves as a waiver of objections that were known or should have been known to the party.~~

~~b. The filing of a request for removal or disqualification shall not stay the proceedings or filing requirements in any way except that the hearing may not be conducted until the Virginia Department of Education issues a decision on the request in accordance with the Virginia Department of Education's procedures."~~

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be deleted. The regulations should remain as they currently appear in Virginia regulations regarding this section. VOPA also opposes the use of the term "Special Education Hearing Officer" as this implies that Hearing Officers will be shifted to the control of the VDOE. We feel that Hearing Officers should remain under the control of the Virginia Supreme Court.

G."~~Duration of the Special Education Hearing Officer's authority.~~

~~1. The Special Education Hearing Officer's authority begins with acceptance of the case assignment.~~

~~2. The Special Education Hearing Officer has authority over a due process proceeding until: a. Issuance of the Special Education Hearing Officer's decision; b. The Virginia Department of Education revokes such authority by removing or disqualifying the Special Education Hearing Officer."~~

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be deleted. VOPA strongly opposes VDOE's proposed control of the Hearing Officers.

J. Responsibilities of the Virginia Department of Education.

"Ensure that the hearing is conducted by individuals who are impartial and who are not employees of the Virginia Department of Education or the local educational agency providing education or care of the child, or by anyone with a personal or professional interest that would conflict with his objectivity in the case;

Notify the Supreme Court of the receipt of either the hearing officer's written decision or other conclusion of the case."

Recommendation: The underlined language appears in the current Virginia regulations, but was removed from the proposed regulations. This language should be maintained to ensure the impartiality of hearing officers and to continue the Supreme Court's oversight.

L.9 Responsibilities of the local educational agency. "Upon request, provide information to the Special Education Hearing Officer to assist in the Special Education Hearing Officer's administration of a fair and impartial hearing;"

Recommendation: The underlined language appears in the current Virginia regulations, but was removed in the proposed regulations. This language should remain to ensure that the hearing is fair and impartial.

"Ensure that a hearing officer is appointed within 5 business days of a request for a nonexpedited hearing and three business days of a request for an expedited hearing."

Recommendation: The underlined language appears in the current Virginia regulations, but was removed from the proposed regulations. We recommend that the underlined language be maintained in the new regulations.

L 16 "Provide the Virginia Department of Education, upon request, with information and documentation that noncompliance findings identified through due process or court action are corrected as soon as possible but in no case later than 45 calendar days ~~later than one year~~ from issuance of the Special Education Hearing Officer's decision."

Recommendation: This is a new section. The proposed regulations have done away with implementation plans. The proposed timeline of one year is too long; therefore, we propose 45 calendar days as appropriate (note: the current Virginia regulations require

that an implementation plan to be submitted within 45 calendar days of rendering a decision or withdrawing a hearing request).

M. Responsibilities of the Special Education Hearing Officer.

"Ensure impartiality, and decline the appointment if the hearing officer is an employee of the Virginia Department of Education or of the local educational agency that is involved in the education or care of the child;

Ensure that the rights of all parties are protected and that the laws and regulations regarding the educational placement or services of the child are followed in the conduct of the hearing and in rendering a decision;"

Recommendation: The underlined language appears in the current Virginia regulations; however, it has been removed from the proposed regulations. We propose that this language be maintained to strengthen the requirement for an impartial hearing and to ensure that laws are followed.

M 11. "…ensure that an atmosphere conducive to impartiality and fairness is maintained at all times in the hearing."

Recommendation: The underlined language appears in the current Virginia regulations but has been removed from the proposed regulations. We propose that this language be maintained to strengthen the requirement that hearing officers conduct impartial hearings.

M 14 "Report findings of act and decisions in writing to the parties but if a party is represented by an attorney, then to their attorney, and the Virginia Department of Education. If the hearing is an expedited hearing, the Special Education Hearing Officer may issue an oral decision at the conclusion of the hearing, followed by a written decision within ~~ten school days~~ five business days of the hearing being held."

Recommendation: The current Virginia regulations require a written decision within 5 business days. Extending the timeline to 10 school days, as written in the proposed regulations, improperly delays the process.

M 15 "Include in the written findings: a. Findings of fact relevant to the issues that are determinative of the case; b. Legal principles upon which the decision is based, including references to controlling case law, statutes, and regulations; c. an explanation for the basis for the decision for each issue that is determinative of the case; and d. if the Special Education Hearing Officer made findings which required relief to be granted, then an explanation of the relief granted may be included in the decision."

Requirements of notice to the parent(s) were satisfied; child has a disability; child needs special education and related services; and local educational agency is providing a free appropriate public education.

Recommendation: The underlined language appears in the current Virginia regulations, but was removed from the proposed regulations. This language should be maintained.

N 9 a. Authority of the Special Education Hearing Officer ~~"In instances where neither party grants an extension of time beyond the period set forth in this chapter, and mitigating circumstances warrant an extension, the Special Education Hearing Officer shall review the specific circumstances and obtain the approval of the Virginia Department of Education to the extension."~~

Recommendation: The strike-through language does not appear in the current Virginia regulations and is unnecessary. Hearing Officers should not be able to unilaterally extend the time of the hearing merely by obtaining approval from VDOE.

O 9 Timelines for non expedited due process hearing "The local educational agency ~~is not required to schedule a resolution session if the local educational agency requests the due process hearing.~~ The 45 day timeline for the Special Education Hearing Officer to issue the decision after the local educational agency's request for a due process hearing is received by the parent(s) and the Virginia Department of Education. However, if the parties elect to use mediation, the 30 day resolution process is still applicable."

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be removed. A resolution session should be mandatory whether the LEA or the parent requests a due process hearing. Moreover, the resolution session is mandatory when parents initiate the due process hearing; the same rule should apply if the LEA requests the due process hearing.

R. Right of appeal. "A decision by the ~~Special Education~~ Hearing Officer in any hearing, including an expedited hearing, is final and binding unless the decision is appealed by a party in a state circuit court or federal district court within ~~90 days~~ one year of the issuance of the decision…."

Recommendation: The strike-through phrase "Special Education" should be omitted because we oppose this new term as it applies to hearing officers being under the control of VDOE, instead of under the control of the Supreme Court.

The strike through phrase of 90 days is new and should be deleted. Virginia should keep the one year as in current Virginia regulations and because federal regulations allow states to set their own timelines.

8 VAC 20-81-220 Surrogate Parent procedures.

B 7. "Each local educational agency shall establish procedures which include conditions and methods for changing or terminating the assignment of a surrogate parent before that surrogate parent's appointment has expired. Established procedures shall provide the right to request a hearing to challenge the qualifications or termination if the latter occurs prior to the end of the term of

appointment. The assignment of a surrogate parent may be terminated only when one or more of the circumstances occur as follows:
a. The child reaches the age of majority and rights are transferred to the child or to an educational representative who has been appointed for the child in accordance with the procedures in 8 VAC 20-81-180;
b. The child is found no longer eligible for special education services and the surrogate parent has consented to the termination of those services;
c. Legal guardianship for the child is transferred to a person who is able to carry out the role of the parent;
d. The parent(s), whose whereabouts were previously unknown, are now known and available; or
e. The appointed surrogate parent is no longer eligible according to subsection D. of this section."

Recommendation: The underlined language appears in the current Virginia regulations and should be maintained to allow for surrogate parental consent.

D 1 b D. Qualifications of surrogate parents.
"1. The local educational agency shall ensure that a person appointed as a surrogate:
a. Has no personal or professional interest that conflicts with the interest of the child;
b. Has knowledge and skills that ensure adequate representation of the child. The prospective surrogate parent must have completed a local educational agency approved training session prior to representing the child. Thereafter, the local educational agency shall provide annual training, as necessary, for surrogate parents to ensure that they possess knowledge of special education and related services for children with disabilities, as well as knowledge of the legal requirements necessary to represent the children effectively;"

Recommendation: The underlined language appears in the current Virginia regulations and should be maintained to ensure that surrogate parents receive the requisite training.

8 VAC 20-81-230 Local educational agency administration and governance.

D. Local advisory committee. "A local advisory committee for special education, appointed by each local school board, shall advise the school board through the division superintendent.
1. Membership.
a. A majority of the committee shall be parents of children with disabilities or individuals with disabilities.
b. The committee shall include representation of gender and the ethnic population of the local school division."
Local school division personnel shall serve only as consultants to the committee."

Recommendation: The underlined language appears in the current Virginia regulations and should be maintained. If it is not, school personnel could serve on this committee and may not be perceived as objective, impartial, or unbiased.

K 4 b Definitions applicable to this subsection

~~b. The term, "blind or other person with print disabilities" means children with disabilities who qualify to receive books and other publications produced in specialized formats. A child with a disability qualifies under this provision if the child meets one of the following criteria:~~
~~(1) Blind person whose visual acuity, as determined by competent authority, is 20/200 or less in the better eye with correcting glasses, or whose widest diameter of visual field subtends an angular distance no greater than 20~~
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~~8 VAC 20-81, Special Education Regulations~~
~~degrees;~~
~~(2) Person whose visual disability, with correction and regardless of optical measurement, is certified by competent authority as preventing the reading of standard printed material;~~
~~(3) Person certified by competent authority as unable to read or unable to use standard printed material as a result of physical limitation; or~~
~~(4) Person certified by competent authority as having a reading disability resulting from organic dysfunction and of sufficient severity to prevent their reading printed material in a normal manner.~~
~~2 USC § 135a; 36 CFR § 701.6(b)(1); 34 CFR § 300.172(a) & (e)"~~

Recommendation: The strike-through language does not appear in the current Virginia regulations and should be deleted. VDOE should not be in the business of medically diagnosing disabilities.

Part V
Additional Responsibilities of State Boards, Agencies, and Institutions for education and training of children with disabilities in residence or custody.

8 VAC 20-81-320 Additional Responsibilities of State Boards, Agencies, and Institutions for education and training of children with disabilities in residence or custody.

B Annual program plan.

"A comprehensive system of personnel development to include the training of general and special education instructional personnel, support personnel, and paraprofessionals as required under 8 20-80-30."

Recommendation: The underlined language appears in the current Virginia regulations and should be maintained. We support the language being maintained because it is important for each LEA to include the training of special education staff in their plans to VDOE.